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## Diversely Native

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# **Diversely Native**

BETHANY R. BERGER

**M**any federal Indian law professors have experienced some version of the following: We go to a law school to give a workshop on a specific aspect of federal Indian law and get a question along the lines of “Why should there be tribes?” One might compare it to giving a talk on a specific aspect of constitutional or international law and getting the question “Why should there be the United States?” These are interesting philosophical questions, and even worth asking in some settings. But focusing on them makes it hard to get to issues that have to be resolved in the present day. This experience—of having to justify an entire field and the continued political existence of hundreds of distinct governments—is a symptom of the broader problem. The law affecting Native American people often doesn’t make sense to lawyers in other fields, and a not-uncommon reaction to the lack of understanding is to ask whether the fundamental rules of the field should exist at all.

So the most important fact in conveying the distinctive questions of diversity affecting Native people in the United States is that there are Indian tribes, and their sovereignty is recognized by law. This has been true since before the U.S. Constitution placed “commerce ... with the Indian tribes” alongside commerce with “foreign nations” and among “the several states” among Congress’ powers in Article 1. It was true when George Washington and the first U.S. Congress determined that treaties with Indian tribes had to be approved in the same manner as treaties with foreign nations. It remained true when subsequent congresses negotiated more than 200 treaties with tribal governments. It is still true today, as dozens of recent statutes, executive orders, and regulations seek to strengthen tribal governments and deal with them through sovereign-to-sovereign relationships.<sup>1</sup>

That’s not to say that policymakers have always agreed that tribes should continue. Different federal policy initiatives from the 1800s through to the 1960s sought to end the existence of Indian tribes. Each time, these initiatives ended with policymakers’ recognition that they only made Indian people poorer and made dealing with the tribes’ nations that stubbornly persisted in existing tougher. So, for at least three decades, U.S. policy has officially recognized that strengthening tribes, not destroying them, is one necessary part of addressing the continuing hardships of Indian people.

A somewhat more modern rationale for the “Why are there tribes?” question is particularly relevant to diversity. It is the concern that federal Indian law is basically racist because it treats people and groups differently because of their race. Understanding the governmental status of tribes helps to address part of this concern: Most of the classifications of federal Indian law are recognitions of the political status of Indian peoples, not their racial status. Understanding the history behind this reality helps respond to this concern as well: Some of the most racist policies toward American Indians sought to deny and destroy tribal governmental status, treat Indians only as individuals with different ethnic heritages, and therefore forcibly assimilate them in non-Indian society. The rest of this article explains these differences and what they mean for policy and law.

## So Who Is an Indian Anyway?

At the Wounded Knee trial, the story goes, the U.S. Attorney was cross-examining Standing Rock Sioux scholar Vine Deloria Jr. The attorney tried to show his liberal credentials by asking Deloria what he would like to be called—Standing Rock Sioux, Native American, or indigenous—because he knew Indians were only called Indians because Columbus was looking for India. Deloria responded, “Well,

we’ve always been happy he wasn’t looking for Turkey.” The jury laughed, and that was the end of his cross.<sup>2</sup>

The point? Don’t get too distracted by terminology. This article alternates between the terms Indian, American Indian, Native, indigenous, and Native American. Native or indigenous are arguably most accurate because they include Alaska Natives and Native Hawaiians (some of whom reject the term Native American). Among collective nouns, though, Indian or American Indian are most common in law. They also tend to be common in Native communities in the continental United States (perhaps reflecting a continuing joke on the successors to Columbus).

Still, the confusion over terminology reflects a more important difficulty when it comes to defining diversity for Native people. The reality is that Indian is defined differently in different contexts. Many of these definitions do not closely track what we think of as race. Felix Cohen recognized long ago that “[f]rom a legal standpoint ... the biological question of race is generally pertinent, but not conclusive. Legal status depends not only upon biological, but also upon social factors, such as the relation of the individual concerned to a white or Indian community. This relationship, in turn, has two ends—an individual and a community.”<sup>3</sup>

In federal Indian law, the most common definition of Indian is that the person (1) is recognized as part of an Indian tribe, (2) which itself is recognized by the federal government, and (3) also has some heritage from the peoples who were here before European settlement. People with these characteristics will be treated as Indians for most tests for jurisdiction and government services. But such people may be primarily white, black, Asian, or some combination of these. They may well not seem “racially” Indian.

People who are Indian by this commonly accepted measure may be challenged for being not Indian enough. Protesters against treaty fishing in Wisconsin combined clearly racist statements—calling the Ojibwa fishers “timber n-ers” and “welfare warriors” and declaring “save a walleye, spear a Squaw”—with others decrying them as insufficiently Indian. Protesters chanted “a half breed here, a half breed there” to the tune of *Old MacDonald*, and denounced the mixed-blood leader of the protests as being “nothing but a f-ing Jew.”<sup>4</sup> Opponents of gaming by the Mashantucket Pequots in Connecticut have complained that they are mostly black or white, not real Indians.<sup>5</sup> In *Adoptive Couple v. Baby Girl*,<sup>6</sup> concerning the Indian Child Welfare Act (ICWA), the U.S. Supreme Court focused on the slight racial heritage of the little girl and her Cherokee father, not the fact that the father and his parents lived within the Cherokee Nation’s jurisdictional area, voted in Cherokee elections, observed Cherokee holidays, and owned land held in trust for Cherokees.<sup>7</sup> In less-fraught contexts as well, people who do not appear Indian may be suspected of being “wannabes,” and asked to prove their Indian credentials.

People may also be Indian for some legal purposes without any Indian heritage at all. If a tribe chooses to admit people without indigenous heritage for membership, those people should be treated as Indians for common law tests of tribal and state jurisdiction, as well as for the federal statutory test under ICWA. Certain descendants of African-American slaves of the Seminole and Cherokee tribes may be recognized as citizens of those tribes and legally Indian, even if they have no Indian blood. While most tribes don’t include non-Indians in official citizenship criteria, some admit non-Indians to citizenship on an ad hoc basis. One South Dakota Supreme Court case, for example, concerned a Caucasian girl who had been adopted

by her Cheyenne River Sioux stepfather and enrolled with the tribe.<sup>8</sup> The court held that, as an enrolled tribal member, the girl was an “Indian child” for purposes of ICWA.<sup>9</sup> In another case, the Navajo Nation Supreme Court held that non-Navajos who had married within the tribe were *hadane*, or in-law members, and were therefore subject to tribal criminal jurisdiction.<sup>10</sup>

The existing measures also exclude people who are Indian in many ways. Individuals with significant heritage who live in a tribal community may not be considered Indian for all purposes if they are not enrolled or eligible to enroll in a particular tribe. Similarly, individuals whose tribes are not officially recognized by the federal government, including tribes with long and well-established histories like the Lumbee of North Carolina and the Houma of Louisiana, are not Indian for mostly legal purposes. Many of these people would be perceived as racially Indian. Many may also have strong cultural connections to their tribes. Yet although they fit within many accepted definitions of Indian status, they are not politically Indian under federal law.

**“And because Indians are tiny fractions of the population—only about 1 percent of all people in the United States, and only 0.2 percent of all lawyers—there is rarely a critical mass able to overcome these stereotypes.”**

One fascinating Title VII case dealt with the difficulties of determining Indian status. In *Perkins v. Lake County Department of Utilities*,<sup>11</sup> Arthur Perkins alleged that he had been denied promotions, paid less, and subjected to derogatory remarks because he was American Indian. In response, the defendants hired genealogists who found that he was not documented as being part of any known tribe and that his ancestors had always been recorded as being white or mulatto. Perkins and his parents, however, believed themselves to be American Indian, and they came from a community in Louisiana sometimes called “redbones,” indicating mixed white, black, and Indian heritage. His co-workers also believed he was Indian, and his employer recorded his race as being Indian.

After discussing the “amorphous and subjective nature of racial classification in general,” the court declared that “when racial discrimination is involved[,] perception and appearance are everything.”<sup>12</sup> Given the “difficulty, perhaps even the impossibility with Native Americans, of establishing unquestionable genetic/hereditary classification,” the court found, “[a]s far as designation of individuals as Native Americans is concerned, there is no hard and fast rule.”<sup>13</sup> The plaintiff did not need to show tribal membership, blood quantum, or satisfy any of the tests in other contexts for Indian status. All he needed to do was show that the employer had a “reasonable belief” with some “objective basis” that he was Indian.<sup>14</sup> Having shown that he held himself out as Indian, may have appeared Indian, and was believed by his employer to be Indian was sufficient to establish that he was a member of a protected class for Title VII.

In short, Indian is sometimes a racial status, sometimes a political status, and sometimes a combination of the two. Self-identification may differ from community identification, and both may differ from legal identification. Definitions of Indian depend on the context and may lead to surprising results.

## Racism and American Indians

In addition to questions of who is considered Indian, understanding diversity requires understanding the distinctive manifestations of racism for Native Americans. Racism often looks different when it comes to American Indians and other indigenous Americans. Don’t get me wrong: Indians have experienced lots of plain vanilla racism. As discussed in Mary Smith’s March *Federal Lawyer* article, a recent survey of 527 Native American lawyers found that 40 percent had experienced demeaning comments or harassment based on their race, ethnicity, or tribal status, and 37 percent had experienced discrimination. Until the 1950s, state law barred Indians from voting in several states, and many Indians, particularly those living near border towns, have been turned away from non-Indian-run hotels and restaurants because of their race. Today, older anti-Indian stereotypes of alcoholism and welfare dependence have been joined by new ones of universal casino wealth and fake claims to Indian-ness. And because Indians are tiny fractions of the population—only about 1 percent of all people in the United States, and only 0.2

percent of all lawyers—there is rarely a critical mass able to overcome these stereotypes.

But the distinctive history of Indian-white relations means that the symptoms of racism are often flipped. The

core of America’s “Indian problem” was how to end Indian claims to land and legal independence. The solution to the problem was to end the existence of Indian tribes, and the way to do that was to end the connections between Indian people and their tribes. One method was to simply kill Indian people. As General John Chivington said in ordering the 1864 massacre of peaceful Cheyenne at Sand Creek, “Kill and scalp all, big and little; nits make lice.” But the dominant method—and the only way accepted as official federal policy—was to assimilate Indians.

As a result, very few states passed laws barring Indian-white marriages, and in 1888, Congress even passed a law rewarding with U.S. citizenship Indian women who married white men. A painting of Pocahontas’ conversion and marriage to John Rolfe was hung in the Capitol rotunda in 1834 and featured on the 1875 \$20 bill. Successful examples of assimilation were welcomed, even celebrated, in many settings from which African-Americans and -Asians were excluded. Indian ball players played on both sides in the 1910 World Series, for example, four decades before Jackie Robinson broke the black-white color line. But this assimilation was celebrated in part because it meant the end of people connected to Indian tribes, and therefore the end of tribes themselves. It was also furthered by clearly racist policies. The policies of this period included the forcible division of reservations among individual Indians and railroads and non-Indian settlers, and the confinement of Indian children in federal boarding schools designed to “kill the Indian ... to save the man.”

In light of this history, focusing on the symptoms of racism familiar from other contexts can lead to backward results. Here is one recent example: In *Adoptive Couple v. Baby Girl*,<sup>15</sup> the Supreme Court held that ICWA did not prevent a little girl from being removed from her Cherokee father and placed with the white couple who wanted to adopt her. Although the case ostensibly turned on stat-

utory construction, the majority was clearly concerned that Baby Girl just wasn't Indian enough. The majority opinion began with this line: "This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."<sup>16</sup> It later declared, "It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law."<sup>17</sup> Neither statement was true. Baby Girl and her father had rights under ICWA because he was a citizen of the Cherokee Nation and she was eligible for tribal citizenship. Degree of Cherokee blood is irrelevant to Cherokee citizenship; all that matters is that she could trace her descent to the members of the tribe in the early 1900s.

Phrasing it as the Court did makes applying ICWA to Baby Girl look like the old one-drop rule some states used to insist that multiracial people were black and could be targeted for discrimination. Understanding Indian history reveals that the Court's decision continued an equally old and racist practice: deciding that intermarriage and assimilation denied individuals the political rights of Indians. The justices' comments during oral arguments showed this belief. Chief Justice John Roberts worried that tribes might establish "a zero percent blood requirement; they're open for, you know, people who want to apply, who think culturally they're a Cherokee." Justice Samuel Alito, who wrote the majority opinion, was troubled that a tribe might make "eligibility available for anybody who, as a result of a DNA test, can establish any Indian ancestry, no matter how slight."<sup>18</sup> These justices aren't trying to make race less important in Indian law—they want it to be more important. The result: Only a small, insulated group can assert the rights of Indians. The problem with Baby Girl and her father, in this light, is that they weren't racially Indian enough. As a result, Baby Girl was taken from the father she loved and away from his home in Cherokee country in Oklahoma.

## Equal Protection and Federal Indian Law

One might think that constitutional law would struggle with the distinct meanings of race in the Indian context. But, in fact, equal protection jurisprudence recognizes that much of Indian law is about the political relationships between the United States and Indian peoples.

In the early days of reverse discrimination lawsuits, the Supreme Court decided *Morton v. Mancari*.<sup>19</sup> The suit challenged the statutory federal preference for Indians in the Bureau of Indian Affairs (BIA). The Court rejected the challenge, refusing to subject the preference to the strict scrutiny generally applied to racial classifications. The Court reviewed the long historical relationship between tribes and the United States, the numerous treaties creating solemn federal commitments to Indians, and the commerce clause's singling out of tribes as a special subject for legislation. As a result of these, the Court found, Indian tribes had a "unique legal status" and Congress had "plenary power ... to legislate on [their] behalf."<sup>20</sup> The Court held that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."<sup>21</sup>

The BIA preference in *Mancari* met this test because it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."<sup>22</sup> Given the "sui generis" status of the BIA, the preference rationally aligned the governors with the governed, like a requirement that elected officials are drawn from the districts they represent.<sup>23</sup>

The *Mancari* formulation has survived the growth of strict scrutiny for affirmative action. The Supreme Court last revisited the *Mancari* formulation in 2000 in *Rice v. Cayetano*.<sup>24</sup> The *Rice* Court held that *Mancari* did not apply to a 15th-amendment challenge to a provision restricting voting to Native Hawaiians in a state election for the Office of Hawaiian Affairs. Nevertheless, the Court affirmed that "as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs."<sup>25</sup>

Under current equal protection law then, federal actions in furtherance of the distinct obligations of the United States to Indians and tribes are subject to rational basis review. These actions are not limited to those implementing specific treaties or tribal agreements. It includes, for example, statutes like the Indian Gaming Regulatory Act, which seek to enhance economic development on reservations, and those regarding Indian education, which seek not only to make good on historical commitments to provide education but also to address generations of harm from federal education policies.

The *Mancari* test does not mean that "Indian" cannot be a racial status for equal protection purposes. The *Mancari* Court suggested that a preference for Indians in all federal jobs would be more suspect.<sup>26</sup> A law requiring that members of Indian tribes ride in segregated train cars would clearly be invalid. Because all Indians are now citizens under federal law, moreover, states may not use Indians' tribal affiliations to deny them the right to vote or to deny Indians services generally available to state citizens. *Mancari* simply means that, despite the reality that Indians usually have a distinct racial heritage, equal protection law is not intended to undermine the longstanding U.S.-tribal relationship or the federal obligations arising from it.

This constitutional consensus is not without challengers. Litigants have argued, for example, that equal protection prevents states from permitting tribal members to exercise treaty rights to fish off-reservation without state regulation. More recently they have challenged

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state laws granting tribes exclusive rights to engage in gambling under the Indian Gaming Regulatory Act. Equal protection concerns have also delayed or defeated self-determination legislation in Congress, including efforts to recognize governmental rights in Native Hawaiians and to recognize tribal rights to punish non-Indian perpetrators of domestic violence against Indian women on reservations. But no court has upheld the challengers' efforts to undermine the *Mancari* formulation.



*Adoptive Couple v. Baby Girl* provides a useful example here as well. Superstar appellate litigator Paul Clement, appearing as amicus curiae, argued hard that applying ICWA to the case would be unconstitutional, and the Supreme Court stated obliquely that its interpretation of the statute avoided “equal protection concerns.”<sup>27</sup> But ICWA and its application to *Baby Girl* are both valid under the established test. First, ICWA applied to *Baby Girl* not because of her race but because of her father’s citizenship in the Cherokee Nation and her own eligibility for citizenship. Second, the measures that would have been required under ICWA fall well within Congress’ unique obligations to the Indians. In *Adoptive Couple*, the birth mother told the birth father that she wanted to raise *Baby Girl* on her own, refused his attempts to contact her, and concealed her adoption plans until *Baby Girl* had been living with proposed couple for four months.<sup>28</sup> Had all of ICWA’s requirements applied, the biological father would have had to get notice of any proposed adoption, available placements with *Baby Girl*’s extended family and other Cherokee families would have gotten preference, and his parental rights could not have been terminated unless it was shown that his custody would have been harmful to *Baby Girl*.<sup>29</sup> All of these requirements are rationally related to unique federal obligations to Indian peoples: correcting the casual removal of children from Indian communities that the federal government actively encouraged from Colonial times through to the 1960s and helping those communities to maintain contact with their future generations.

## Conclusion

Native people face many of the diversity challenges facing other people of color, people from different cultures, and people living in extreme poverty. But they also face distinctive challenges, challenges rooted in their unique histories and status as formerly autonomous peoples in what is now the United States. The reaction to this distinct status is sometimes to declare it incoherent and racist, and even to seek to stamp it out. In the 1950s, Felix Cohen commented on yet another policy seeking to terminate the existence of Indian tribes in the name of coherence and equality:

[T]he Indian plays much the same role in our American society that the Jews played in Germany. Like the miner’s canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.<sup>30</sup>

Cohen recognized that Indian peoples’ claims made respecting their rights distinctly challenging. The extent to which the United States met this challenge, he saw, was a crucial test of our commitment to diversity, equality, and, ultimately, our democratic faith. ☉



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*the Duke Law Journal, among other publications, and have been excerpted and discussed in many casebooks and edited collections as well as in briefs to the Supreme Court and testimony before Congress. Before entering academia, Professor Berger was the director of the Native American Youth Law Project of DNA-People’s Legal Services serving the Navajo and Hopi Nations, and then managing attorney at Advocates for Children of New York. She has served as a judge for the Southwest Intertribal Court of Appeals and as a visiting professor at Harvard and the University of Michigan.*

## Endnotes

<sup>1</sup>See, e.g., Tribal Law and Order Act of 2010, PL 111-211 (enhancing tribal sentencing authority and requiring closer cooperation between federal government and tribal law enforcement authority); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (2000) (President William J. Clinton) requiring consultation and coordination with tribal governments); Memorandum of Nov. 5, 2009, Tribal Consultation, 74 Fed. Reg. 57,881 (President Barack H. Obama) (ordering agencies to submit plans and reports on implementation of consultation requirement).

<sup>2</sup>“Native American History,” C-SPAN 2 (Oct. 12, 2002), [www.c-span.org/video/?173186-10/native-american-history](http://www.c-span.org/video/?173186-10/native-american-history) (interview with Vine Deloria Jr.).

<sup>3</sup>Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 2 (1941).

<sup>4</sup>*Lac du Flambeau v. Stop Treaty Abuse-Wisconsin Inc.*, 843 F. Supp. 1284 (D. Wis. 1994).

<sup>5</sup>Renee Ann Cramer, *The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment*, 31 LAW & SOC. INQUIRY 313, 330 (2006);

<sup>6</sup>133 S. Ct. 2552 (2013).

<sup>7</sup>Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 296, 332-33 (2015).

<sup>8</sup>*In re A.L., M.L., & M.L.*, 442 N.W.2d 233 (S.D. 1999).

<sup>9</sup>*Id.* (construing 25 U.S.C. 1903(4)(a)).

<sup>10</sup>*Means v. District Court of the Chinle Judicial District*, 2 Navajo Appellate Rep. 528 (Nav. Sup. Ct. 1999).

<sup>11</sup>860 F. Supp. 1262 (N.D. Ohio 1994).

<sup>12</sup>*Id.* at 1274, 1277.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 1277 & 1278.

<sup>15</sup>133 S. Ct. 2552 (2013).

<sup>16</sup>*Id.* at 2556.

<sup>17</sup>*Id.* at 2559.

<sup>18</sup>Berger, *supra*, at 326-327.

<sup>19</sup>417 U.S. 535 (1974).

<sup>20</sup>*Id.* at 551.

<sup>21</sup>*Id.* at 555.

<sup>22</sup>*Id.* at 554.

<sup>23</sup>*Id.*

<sup>24</sup>*Rice v. Cayetano*, 528 U.S. 495 (2000).

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

<sup>28</sup>Berger, *supra*, at 301-304.

<sup>29</sup>25 U.S.C. § 1912.

<sup>30</sup>Felix S. Cohen, *The Erosion of Indian Rights 1950-1953: A Case Study in Bureaucracy*, 62 YALE L. J. 348, 390 (1953).